

Developing a Consortium – the legal and practical considerations

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Organisational Models for Delivering Public Services

- New Legal Body
- Lead Body
- External Body

Organisational Models for Delivering Public Services

cont'd

- New Legal Body
 - ◆ Powers to set up?
 - ◆ Man of Straw?
 - ◆ Performance guarantees
 - ◆ Risk allocation
 - ◆ Set up and on-going management costs
- Which organisational form/vehicle?
 - ◆ Limited Companies
 - ◆ Community Interest Company
 - ◆ Industrial and Provident Societies

Organisational Models for Delivering Public Services

cont'd

- Lead Body
 - ◆ Prime Contractor responsible for managing the group/project
 - Within their Objectives?
 - ◆ Advantage of one interface
 - ◆ Risk allocation in sub-contracts with each consortium member which deal with requirements for delivery of main contract
 - ◆ Steering Group

Organisational Models for Delivering Public Services

cont'd

- External Body
 - ◆ Who?
 - ◆ Private Sector organisations?
 - ◆ Potential for cultural clashes
 - ◆ Potential for capacity building role

Segregated Joint Venture Model

- No new vehicle required – less complexity and cost
- 3-way contractual arrangement
- All issues dealt with under one contract to which all consortium members are parties
- Clear allocation of responsibilities
- Cross indemnities
 - ◆ e.g. delay/loss/expense claims
 - ◆ Possibility of step in rights

Challenges for Third Sector Organisations Delivering Public Services

- Organisational and Capacity Challenges
- Workforce Issues
- Commercial and Contractual Issues



Organisational and Capacity Challenges

- Does our Governing Document allow us to do this?
- Does the activity fit within our core mission?
- Do we have the necessary resources?
- Will we need to set up a separate board?
 - ◆ Potential conflicts?
- Do we understand the risks involved and how to manage them?
- Can we submit a credible bid?

Special Issues for Charities

- Charity's objects must be exclusively charitable (and demonstrate public benefit)
- Charities must only undertake activities that further their objects and are within their powers
- Charities must be independent of government and other funders
- Trustees must act only in the interests of the charity and its beneficiaries

- Trustees must exercise reasonable skill and care and act prudently in the use of resources
- Do we need to amend the governing document?
- Will the contract constitute “primary purpose trading” activity? If not, is tax exempt status compromised?
- Are the risks such that we need to consider ring-fencing this activity in a separate legal entity?

Workforce Issues

- Is there a TUPE transfer?
- If so, you will inherit liabilities and costs associated with the workforce
- Due diligence will be required on terms and conditions, so you can price accurately (watch out for enhanced redundancy entitlements and sickness benefit schemes)
- What if the workforce needs to be re-organised?
- You and the Commissioner need to inform and consult the workforce
- Alternatives – secondment; retention of employment models

Pensions

- Make sure you price for the pension contributions
- Don't unwittingly take on risk of under-funding

Local Government Pensions

- Are the staff members of the Local Government Pension Scheme, if so, this will be a major concern for staff affected
- Access to LGPS (admitted body status)
- Fall-back position: you will have to provide a 'broadly comparable' pension certified by GAD

NHS Pensions

- Who is eligible:
 - ◆ NHS staff
 - ◆ organisations which hold an APMS, PMS or SPMS contract
 - ◆ organisations which are eligible to obtain a 'direction body' order under s.7(2) of the NHS Superannuation Act 1967

Commercial and Contractual Issues

- Have you carried out any due diligence?
- A consortium has no legal status (unless it is a new legal body)
- Have you considered a Consortium/Pre-Bid Agreement?
- What length of contract can you obtain?

- How secure is the income stream – is it performance-related?
- Are the specifications and expected outcomes clearly defined?
- Is the contract a balanced allocation of risks and rewards?
- Will you obtain full cost recovery (otherwise you will be subsidising the public purse)

Key Contract Clauses to watch for

- Payment mechanics – effect on cash flow
- Price inflation clauses – are they realistic?
- Indemnities and liability – consider capping your exposure
- Termination rights and the consequences (transfer of services, assets, employee liabilities etc)
- Dispute resolution – use of ADR techniques
- Contract Termination

Contract Termination

- How easy is this for youand the other consortium members?
 - ◆ High hurdle
- Where there is a lead partner, have they factored in a 'buffer' zone for non-performing supply organisations?
- Key issues to cover:
 - ◆ Handover and other exit provisions
 - ◆ Data protection and confidentiality
 - ◆ Workforce issues
 - ◆ Interim liability?

Other Commercial Issues to be aware of

- Insurances (negligence and public liability, employer's liability, business interruption, trustee liability)
- Regulation and Licensing (Local Authority)
- Data Protection and Freedom of Information
- Intellectual Property Rights, branding and reputation
- Tax and VAT
- Assets
- Early dialogue with commissioners

Conclusions

- Go into this with your eyes open and think carefully about the risks
- Make sure your organisation is ready to take on the challenges

Creating Partnerships for Public Services

- Public-Private Partnerships
- Outsourcing
- Joint Ventures
- Development & Regeneration
- Charities & Not-for-Profit
- Social Enterprises
- Transaction Management
- Training & Capacity Building

Innovative Legal Solutions
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